

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 JULIE MILLER,)
4 Plaintiff,) Case No. 3:11-CV-1231-BR
5 v.)
6 EQUIFAX INFORMATION SERVICES,)
7 LLC, a foreign limited liability)
company,)
8 Defendant.)
-----) Portland, Oregon
9

10 TRANSCRIPT OF PROCEEDINGS

11 (Oral Argument)

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13 BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

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1 (Friday, December 20, 2013; 9:08 a.m.)

PROCEDINGS

5 THE COURT: So, we are back on the record in the
6 matter of Miller versus Equifax to review the defendant's
7 motion, which is Docket No. 91, for reduction of the punitive
8 damage award.

I've read all of your papers. I'm interested in any further guidance you would like to provide. And, in particular, I think it's fair to assume that I'm going to have to reduce the award. And so I'm interested in what you view as the absolutes that exist in the case law and the ranges within which I should give serious consideration to reduction.

I don't mean to presume anything adverse to the plaintiff, but the breadth of the difference here between compensatory damages and punitive damages is so wide that I don't see any basis on which I can sustain that judgment.

20 Now, issues of ratio come and go. There's some
21 argument plaintiff's make that the attorney fees they will be
22 awarded once a judgment is entered should be considered in
23 the ratio calculation. I'm not finding authority to support
24 that proposition, so I'm interested in why that factor should
25 be taken into account.

1 It seems to me attorney fees are not a fair measure,
2 in any event, of harm because the plaintiff will be fully
3 compensated for the attorney fees she incurred.

4 It's not -- it's not anything individual to her and
5 to doesn't really measure the kind of harm that the ratio
6 looks at; at least that's my understanding. But I'm
7 certainly open to being redirected.

8 It's Equifax's motion. Ms. Sumner, are you arguing
9 it?

10 MS. SUMNER: I am, your Honor.

11 THE COURT: All right. Good afternoon.

12 MS. SUMNER: Good afternoon. Would you have prefer me
13 to stand or sit?

14 THE COURT: You're fine where you are.

15 MS. SUMNER: Okay. Thank you, your Honor.

16 THE COURT: On your feet, that is.

17 MS. SUMNER: May I go over here, then --

18 THE COURT: You may if you want. Sure.

19 MS. SUMNER: I have to admit my eyes are not quite as
20 good as they used to be, in terms of trying to view it from the
21 lower table. Thank you, your Honor.

22 THE COURT: Go ahead.

23 MS. SUMNER: Your Honor, I don't intend to rehash,
24 obviously everything in the briefs. Because, like you've said,
25 you've had the opportunity to review it. So I would just like

1 to hit a few of the highlights, from Equifax's perspective, and
2 why Equifax believes that it is appropriate to be looking at a
3 one-to-one ratio despite the fact that there is a very
4 significant amount at issue, that -- in terms of the jury's
5 award of 18.4 million in punitive damages.

6 To start off with, I do want to make it clear that
7 it is Equifax's position that the maximum constitutional
8 award should be a one-to-one ratio, which would mean a
9 180,000 dollar punitive damages award in addition to the
10 compensatory damages.

11 And I would ask your Honor to consider a couple of
12 things. And particularly looking at some of the Supreme
13 Court decisions and the -- and the findings of -- of the
14 court in **State Farm** -- excuse me, in **Gore**, and other cases
15 that I would like to mention.

16 One is that -- that in **State Farm** the Supreme Court
17 recognized and expressed distinct concern that juries will
18 use their verdicts to express vices against big businesses,
19 and particularly those without strong local presences.

20 And Equifax would ask your Honor to consider that
21 when taking a look at what the jury returned and what is --
22 is actually appropriate and constitutional.

23 Further, because here we're subjected to civil
24 punitive damages that do not have the protections afforded in
25 criminal proceedings, it's also important to take a look at

1 the boundaries of what would be appropriate because punitive
2 damages pose an acute danger of irrational and arbitrary
3 deprivation of property, which we believe occurred here.

4 When your Honor considers the **Gore** factors, the
5 degree of reprehensibility as the number one factor; the
6 disparity between the actual harm suffered by the plaintiff
7 here, which are the compensatory damages awarded, and the
8 punitive damages; and then the difference between the
9 punitive damages and the civil penalties that would be
10 authorized, it also makes clear that a very low ratio would
11 be appropriate.

12 I do want to point out, too, your Honor, in
13 considering the record, we ask that the Court evaluate what
14 was before the jury and not extra-record evidence that the
15 plaintiff provided. In particular, I will point to a
16 declaration by another counsel who represented a plaintiff,
17 Williams, in a case. That case was not before the jury.
18 There were three other cases that were considered. We
19 believe that the Court should disregard such evidence. That
20 this is a Rule 50 motion, as a matter of law, and that it
21 would be inappropriate to start bringing in evidence outside
22 of the record. However, if your Honor were to consider that,
23 then we would like the opportunity to rebut that.

24 The starting point, your Honor, for this is we
25 believe, not at looking at what the actual award was because

1 it is clearly excessive, but looking at the compensatory
2 damages that were actually awarded in this case.

3 And in order to do that, it is clear that the jury
4 did not find even the amount of compensatory damages that
5 plaintiff's counsel requested.

6 You may recall, and the record would reflect, that
7 plaintiff's counsel requested compensatory damages of
8 400,000. The jury awarded damages of 180,000.

9 And those damages were all for emotional distress.
10 There were no economic damages outside of that. There was no
11 physical injury or harm. It was all based on emotional
12 distress when, in and of itself, that has a punitive damages
13 aspect to it. And courts have recognized that. So there is
14 some overlap between emotional distress damages and punitive
15 awards.

16 In considering the ratio, your Honor, we would ask
17 that you focus on several cases that we believe are
18 instructive. The **Bach** cases, **Bach I** and **II**, which are cited.
19 And the **Noyes** case, which is a Ninth Circuit case in 2009,
20 where the court reduced the punitives to a one-to-one ratio,
21 given the modest reprehensibility of the defendant's conduct
22 in that case.

23 **Exxon Shipping** is also instructive, where the Court
24 recognized that where there are few earmarks of exceptional
25 blameworthiness within the punishable spectrum, that the

1 punitive award should be at a lower range; and suggested, on
2 average, less than one-to-one ratio.

3 And this case, as your Honor knows, involves
4 reckless conduct only. If you look at the **Gore** factors and
5 you focus on, first, the reprehensibility factor, which
6 breaks down to five different potential issues to consider,
7 three I think we can put aside immediately. One of that
8 would be that this involved malice, trickery, or deceit.

9 If you recall, plaintiff conceded that this was not
10 a case involving malice. That it was not intentional
11 misconduct. And, in fact, that part of the punitive damages
12 instruction was not provided to the jury because the focus
13 was on recklessness. So that **Gore** factor shouldn't be
14 considered here.

15 The other two that should be quickly set aside are
16 the two that deal with harm. One is physical harm to the
17 plaintiff in the case. And here we have a concession during
18 trial that there was no physical harm, and your Honor
19 instructed the jury as such.

20 In addition, the -- another factor is the focus on
21 whether the defendant's conduct endangered the health and
22 safety of others. And, again, there was no evidence of any
23 of that related to this case.

24 So three of the reprehensibility factors, your
25 Honor, I would say should be set aside immediately. And then

1 there are two that probably bear some reason for discussion.

2 One of those is financial vulnerability. And, of
3 course, Ms. Miller argues that she is potentially vulnerable,
4 and that that should be considered here.

5 We submit to you that she is not, under the case
6 law. And if you look at the **Bach** cases, where they did find
7 that the plaintiff was financially vulnerable, that plaintiff
8 was elderly and had suffered a severe stroke. You know,
9 putting her in a very different position than Ms. Miller, who
10 is employed; who testified that, you know, that this didn't
11 impact her status in the community. It didn't cause her
12 economic damage. And, in fact, she was represented by
13 counsel and had filed suit against other companies, the other
14 two CRAs, prior to filing suit against Equifax.

15 If your Honor could take a look at --

16 THE COURT: Well, how is the plaintiff's ability to
17 vindicate her right relevant at all to vulnerability in the
18 financial realm? That goes to the risk that the defendant's
19 conduct posed to her before she stood up to say, I'm not going
20 to take it anymore.

21 It's not really probative that she have lawyers
22 helping her vindicate her rights. To me the vulnerability
23 question with respect to Ms. Miller is the risk of her
24 identity theft and the legitimate concern she had, supported
25 by the evidence, that when her data was mixed with that of

1 the other consumer, there was this ongoing unresolved risk
2 that she might be victimized.

3 That's the kind of vulnerability that I think does
4 exist on this record, regardless of the fact that she was
5 well employed, well spoken, capable of standing up for
6 herself.

7 I agree she's not the elderly plaintiff in **Bach**.
8 But in today's economic world, where everything turns on the
9 electronic transaction, it seems to me fair to infer a form
10 of economic vulnerability when one's financial identity has
11 been jeopardized by a willful violation; hence the jury found
12 here.

13 Am I missing something here?

14 MS. SUMNER: I would make two points, your Honor.

15 First, I would ask you to take a look at the
16 **Bridgeport Music** case, which is the Sixth Circuit. I believe
17 it's a 2007 case, where the Sixth Circuit did find that where
18 a plaintiff had previously brought similar lawsuits relating
19 to the same issues and was represented by counsel, that that
20 person would not be considered vulnerable in the context of
21 this type of litigation. That's not an --

22 THE COURT: Were the lawsuits that were previous in
23 **Bridgeport** previous in time or did they simply involve separate
24 actions against the different credit reporting agencies for the
25 same kind of violation, as was Ms. Miller's case here?

1 MS. SUMNER: It was not an FCRA case, your Honor. So
2 its simply focused on the fact that it was a -- a plaintiff who
3 had a -- I'm sorry.

4 THE COURT: I didn't find **Bridgeport** to be very
5 helpful here because it seems different. And I -- to me, the
6 fact that Ms. Miller brought an action against all those she
7 thought were responsible for the same pattern and the same
8 generic kind of harm simply shows she's standing up for her
9 rights.

10 The vulnerability, to me, really ought to focus on
11 what risks did she face as a result of the defendant's
12 willful violation. And, to me, that risk basically came down
13 to the risk of her identity -- her financial identity being
14 stolen, and the fear; for which the jury compensated her
15 about that.

16 So I'm -- I wouldn't agree that she is not
17 financially vulnerable here in the sense that you're arguing,
18 although it's an issue of degree. And her vulnerability
19 certainly is less than an elderly person like the plaintiff
20 in **Bach**, who has other limitations.

21 MS. SUMNER: And, your Honor, if I might, two other
22 points on that issue before we move on, that I do think, again,
23 worth mentioning.

24 I know the plaintiff relies heavily **Saunders** to make
25 their argument that she is financially vulnerable. And I do

1 want to point out some distinctions.

2 That is an FCRA case. And in that case, the Fourth
3 Circuit did find that there was financial vulnerability. But
4 there the consumer produced evidence demonstrating that he
5 had actually suffered a significant drop in his credit
6 report. He also suffered economic damage as a result of it
7 by not obtaining credit.

8 If you recall, your Honor, this is not a scenario
9 where Ms. Miller produced any evidence whatsoever to show any
10 impact on her credit score, nor did she provide evidence
11 relating to economic damage.

12 So I guess I would ask you to consider that if you
13 were to find her financially vulnerable, you know what that
14 does is put just about any consumer who takes -- you know,
15 files an action against a CRA because they don't believe that
16 the CRA has not complied with -- with the F -- with the Fair
17 Credit Reporting Act, then just about any consumer could be
18 considered financially vulnerable. And I think --

19 THE COURT: Well, when one considers the power that
20 the credit reporting agencies have over consumers generally, in
21 a limited number of consumer reporting agencies in whom
22 Congress has permitted the vesting of all of this financial
23 data, I'm not sure that gives me a lot of comfort.

24 Vulnerability -- financial vulnerability is a factor
25 and one of degree. And I will grant you that Ms. Miller did

1 not prove and did not suffer any out-of-pocket financial
2 losses. But the jury found persuasive her testimony about
3 her fear of losing her financial identity, her fear of being
4 victimized because she repeatedly was associated with this
5 other person, and Equifax was not responding.

6 And I'm simply saying it seems to me there is a
7 financial vulnerability that arises from the loss of one's
8 control over one's financial data. We see it in the national
9 news today. A national fright being reported over this issue
10 with the Target stores, where consumers who used credit card
11 or debit card authorizations to transact business in the last
12 three weeks are all being told that their identify now -- or
13 that -- the identity for that account may be subject to theft
14 or misuse.

15 I just think it's naive to say that when one's
16 financial identity is at issue that there isn't some form of
17 financial vulnerability.

18 I don't see that the cases have elaborated that, but
19 they haven't ruled it out, either. It's on a continuum; is,
20 I guess, how I would look at it unless there's a case that
21 tells me I can't.

22 Is there?

23 MS. SUMNER: Well, the cases reflect that -- that
24 financial vulnerability focuses on the weakest of the herd.
25 Here you're focusing on the herd, when you're talking about

1 individuals --

2 THE COURT: But it's because of the nature of the
3 misconduct by the credit reporting agency. We have a
4 different-in-kind risk here that arises from the work of a
5 credit reporting agency. And when it comes down to logarithms
6 and financial -- and -- pardon me -- and computer programs and
7 decisions that are removed from a human decision maker, as
8 opposed to that individual consumer like Ms. Miller, who tried
9 repeatedly to get a problem solved and all the while a
10 vulnerability to financial harm exists, I think that does weigh
11 in -- in favor of a finding of reprehensibility based on a risk
12 of financial harm but to a lesser degree than in other cases.
13 It's simply something that I don't think I should ignore,
14 especially given the nature of the trust placed in a credit
15 reporting agency like Equifax and -- and the risk to the
16 consumer -- any consumer -- when this kind of error goes
17 unaddressed as long as this one did.

18 So I -- I'm not persuaded that financial
19 vulnerability weighs in Equifax's favor here. It's also not
20 the end all and be all, here.

21 MS. SUMNER: I understand, your Honor. And unless you
22 have more questions on that, I'll move on to the last factor.

23 THE COURT: Reprehensibility, yes.

24 MS. SUMNER: Reprehensibility analysis. Which is
25 really the repeated wrongdoing aspect of this.

1 And, here, I think the cases make clear that the
2 repeated wrongdoing is not focused on repeated conduct within
3 a -- a series of transactions that occur with the plaintiff,
4 but is focused more on repeated conduct outside of that
5 context.

6 And, of course, Ms. Miller relies heavily on the
7 verdicts that -- that were presented to the jury. There were
8 three verdicts. As you know, Equifax objected strenuously to
9 providing that information to the jury. And I would ask that
10 your Honor consider a couple of things with respect to that.

11 One is the evidence was -- did not support that
12 those three verdicts related to very similar conduct, and in
13 fact they were all identity theft cases. They were not
14 scenarios which occurred with Ms. Miller's case; which, as
15 you know, is an online combine because of their similar
16 identification information.

17 In addition, three verdicts that had general verdict
18 forms -- and it was even unclear as to what the jury found
19 Equifax had -- had done in violation of the FCRA -- would not
20 support any nationwide pattern or practice, particularly when
21 you look at the volume of credit files that Equifax manages
22 on an annual basis.

23 The numbers as you know, again, from the evidence --
24 are tremendous. We're talking 250 million. So three
25 matters, with general verdict forms that do not have the same

1 conduct at issue, should not support this aspect of
2 reprehensibility.

3 So it would be Equifax's position, your Honor,
4 recognizing our agreement on the financial vulnerability
5 question, that there is very little evidence of
6 reprehensibility with respect to the conduct at issue.

7 The second **Gore** factor, your Honor, is the
8 comparison between the compensatory and punitive damages.
9 And I think it is important to note that the Supreme Court,
10 of course, has not created a bright line, which I know makes
11 it difficult for your Honor to come up with the exact figure
12 that may be appropriate. But it has strongly cautioned
13 against awards that exceed single-digit ratios. And, in
14 fact, where it has focused is on a one-to-one ratio, which
15 would support compensatory -- I mean, which would support
16 punitive damages of 180,000.

17 And I think the area where the courts have
18 recognized that a higher ratio would be appropriate is when
19 the compensatory damages are very nominal. And I think one
20 example that a court used was if -- if someone has a rifle
21 and they shoot into the crowd and they don't actually hit
22 anyone but they have some minor property damage, then the --
23 the compensatory damages may be very nominal, but the -- the
24 punitive damages may be a much higher ratio because of the
25 conduct at issue.

1 The -- the cases that support a higher ratio are
2 really intentional conduct with very high levels of -- of
3 blameworthiness. And I will ask you to take a look at the
4 **Planned Parenthood** case because that is a case in which the
5 Ninth Circuit reduced an award from 206-to-1 to 9-to-1. But
6 this is a scenario with exceptionally blameworthy conduct,
7 where we have anti-abortion activists putting wanted lists
8 for doctors. And in fact doctors had been murdered after
9 being placed on similar lists.

10 So the court found, in that context, in light of --
11 of the blameworthiness of that conduct and the egregiousness
12 of it, that a higher ratio was appropriate.

13 Because there, too, the amount of damages that had
14 been awarded to the doctors was only about 50,000 dollars
15 per. So, again, a relatively low compensatory damage amount,
16 a very high blameworthiness in terms of the conduct, which
17 warranted a higher ratio.

18 We had provided your Honor with a lot of cases which
19 support a one-to-one ratio. And, in fact, I think it's in
20 the **Exxon** case where they -- where the court recognizes that
21 most of the ratios are below one-to-one. So I think that it
22 is important for your Honor to take a look at that; not
23 necessarily focusing on what the jury actually awarded but
24 what would be appropriate in the context of the particular
25 circumstances of this case.

1 The other case I know that plaintiff's counsel
2 focused on is the **Johansen** case, which is an Eleventh Circuit
3 case.

4 And there the Eleventh Circuit approved a 100-to-1
5 ratio. Again, that was a scenario where the compensatory
6 damages were relatively low. They were 47,000 dollars. And
7 this was a circumstance of pollute and pay, where a company
8 was profiting from polluting. And there was a very high
9 state interest here. And so in that case the court did
10 recognize and uphold on extremely high ratio. That is not
11 appropriate in the context of this case.

12 There -- most of the cases that would be analogous
13 here have very low ratios. And that is what the Supreme
14 Court in **State Farm** supported. That it would be highly
15 unusual to be above a -- a two times, three times, or four
16 times the compensatory damages.

17 THE COURT: So is the highest -- what is the highest
18 ratio that's been endorsed in a FCRA case?

19 I know of the **Dixon-Rollins versus Experian** case out
20 of the Eastern District of Pennsylvania. There, the trial
21 court imposed a nine-to-one ratio.

22 Are you aware of any higher ratios in a FCRA case?

23 MS. SUMNER: I am not, your Honor. And I would say --

24 THE COURT: Are you aware of ratios higher than
25 one-to-one in a FCRA case that have been endorsed by an

1 appellate court?

2 MS. SUMNER: I will say that there are verdicts that
3 are higher than one-to-one. I don't know --

4 THE COURT: Verdicts don't help in --

5 MS. SUMNER: No.

6 THE COURT: -- the context of reviewing for
7 excessiveness.

8 So I'm looking for the outliers and what other
9 courts have done in the context of a FCRA setting, not other
10 kinds of claims. Because you, and I know Ms. Leonard, will
11 spend your time pointing out why they're different as opposed
12 to the same. So I'm interested in the comparison range in
13 FCRA cases, if you can offer any. Maybe you've been involved
14 in some.

15 MS. SUMNER: I -- I cannot think of one, your Honor,
16 that has gone to the appeal level, which --

17 THE COURT: How about in trial court reviews?

18 MS. SUMNER: I can think of the -- the -- actually the
19 cases that were cited by plaintiff. And I'm not -- I cannot
20 think of others, other than those. And that, of course,
21 provides some context for what the juries have awarded and what
22 has been presented to the trial court in terms of the
23 possibility of reducing those amounts.

24 THE COURT: I haven't gone back to check the record,
25 but correct me if I'm wrong in my memory.

1 I thought when we discussed jury instructions, both
2 sides ruled out my -- or both sides asked that I not instruct
3 the jury on ratios or parameters. And, of course, I didn't.
4 Does that bear on -- in any way on the analysis I should be
5 following now?

6 A jury made a decision, based on the record, that
7 Ms. Miller sustained 180,000 dollars in compensatory harm.
8 And the jury, without guidance from me -- and I think it was
9 at the request of both sides because each side had a reason
10 not to want a standard put in front of the jury. Plaintiff
11 didn't want it limited to some single-digit range, and
12 defendant didn't want that suggestion even made to the jury,
13 that punitive damages would be warranted, never mind in a
14 range larger than compensatory damages.

15 But does the fact that the parties have the
16 opportunity and then persuaded me not to give the jury
17 guidance around ratios have anything to do with the analysis
18 I'm required to make now?

19 MS. SUMNER: Your Honor, I don't think it bears on the
20 constitutional analysis that the Court is required to consider.
21 That is not one of the **Gore** factors, and I don't believe that
22 it plays into that.

23 I think what the Court must consider is what would
24 be the appropriate constitutional limit, not based on what
25 the jury actually returned as a -- a punitive damages award.

1 The cases --

2 THE COURT: Well, there's some message the jury was
3 sending, and there's a jury for a reason. They're the triers
4 of fact, not the Court. They made a deliberate decision that
5 the compensatory damages -- and I -- I wouldn't say this is a
6 nominal award of compensatory damages, given the very factors
7 you've been pointing to. They made a compensatory award that
8 was significant and then they came at it with great
9 multipliers. I've forgotten what the number is here, what the
10 ratio is; a thousand or something.

11 Anyway, the point is, don't I have to give some
12 deference to the fact that the jury did what they did?

13 And considering ratios, assuming I'm bound to --
14 say, for example, a single-digit ratio. Why would I endorse
15 a one-to-one ratio when this jury felt so strongly that
16 punitive -- that -- that the defendant should be punished?

17 MS. SUMNER: Your Honor, you do not owe deference to
18 the jury's finding. And that -- and it is clear, from **State**
19 **Farm**, that there is a -- a high risk that jurors will sometimes
20 be prejudiced and biased against out-of-state corporations,
21 especially wealthy corporations. And --

22 THE COURT: Or, as is noted in the environmental case,
23 there's also legitimate value to an award that actually stings,
24 one that reaches the pockets of a very wealthy defendant, even
25 if the conduct isn't physically harmful but it's likely to be

1 repeated; it's the kind of conduct that would -- would run a
2 risk of harm to consumers everywhere.

3 So why shouldn't the Court consider the fact that
4 this jury -- the breadth of the disparity here has a message?
5 And if I have discretion in trying to set an appropriate
6 ratio, why shouldn't it be at the very highest end that the
7 Constitution would permit, as opposed to one-to-one or less?

8 MS. SUMNER: Your Honor, the analysis does not give
9 deference to the jury's verdict. The analysis does not start
10 at looking at what the jury awarded. That is not in the
11 analysis at all.

12 And -- and if you look to the Supreme Court's
13 guidance, they warn against doing that.

14 THE COURT: But in determining an appropriate ratio,
15 clearly there is no bright line rule.

16 And when one is looking at the various factors, why
17 would a court choose the most minimal ratio when a higher
18 ratio might likewise be justified under the law, especially
19 when the jury found in such a significant way that the
20 defendant needed to be punished?

21 There isn't any question but that the Court has to
22 follow the legal standards, but there also is not a bright
23 line rule. So when one seeks to determine the appropriate
24 ratio, you have to base that on something.

25 And I'm simply saying it seems to me, in the context

1 of guidelines -- much like in the context of sentencing
2 individuals, where we have federal guidelines -- the
3 guidelines are there to provide guidance. There is an
4 absolute line somewhere, beyond which there's constitutional
5 uniformity. But if I can identify that line, why shouldn't
6 the punitive damage award be the highest that the
7 Constitution would permit, given the message that this jury
8 sent?

9 You're saying it's -- it's not a factor at all?

10 MS. SUMNER: That's correct, your Honor. I don't
11 think that --

12 THE COURT: All right. Then why shouldn't it be the
13 highest the Constitution should permit anyway, because the jury
14 clearly was motivated by the fact that the factors on which I
15 did instruct them, without guidance about ratios, produced this
16 particular outcome?

17 MS. SUMNER: Well, your Honor, as you know, we
18 respectfully disagree about some of the evidence that was
19 presented to the jury about the other verdicts. And so, of
20 course, it's our position that they were inflamed by that.

21 We -- we don't know exactly why the jury decided
22 to --

23 THE COURT: Well, if you're arguing inflammation, why
24 isn't it just as appropriate to infer that this jury was
25 concerned, legitimately -- because they're permitted to

1 consider the wealth of the defendant when punishing -- that
2 they needed to determine an award that was enough to make the
3 point? Enough to sting, as in the environmental case?

4 MS. SUMNER: The -- the -- at this point, though, your
5 Honor, the constitutional analysis does not include wealth.
6 And so I --

7 THE COURT: I'm back -- I'm trying to focus, however,
8 on the notion of the ratio. And if nine-to-one is appropriate
9 in a FCRA case, as was the case in this one out of the Eastern
10 District of Pennsylvania -- is it higher in other FCRA cases?

11 MS. SUMNER: I'm not aware of any higher ratio, your
12 Honor, and I think it would be inappropriate to apply that
13 ratio because I don't think the -- the issues are the same in
14 this case. And I'll also point out there was not evidence
15 before the jury to reflect any type of ongoing FCRA errors with
16 respect to its matching process. In fact, the evidence was
17 just the opposite.

18 They have might have discounted the expert --
19 evidence of our expert, who testified. But the record
20 reflects that the FTC supported the matching algorithm which
21 combined these two individuals and created this problem.

22 THE COURT: Well, that might have justified a lower
23 jury outcome in the end, if the defendant had responded to the
24 first complaint of Ms. Miller.

25 But in the light most favorable to Ms. Miller, this

1 was a two-year saga that was met with nothing but being blown
2 off. It took her suing, to get action. And that is conduct
3 that I think appropriately a jury could consider, regardless
4 of your views about whether the evidence was properly
5 submitted. All of that could weigh legitimately in the
6 calculus that led -- that -- that would lead to, ultimately,
7 a constitutionally permissible award.

8 So it seems to me taking advice from other FCRA
9 cases is appropriate for the Court to consider, especially
10 when my duty, in the end, is to ensure that the punitive
11 damage award that makes in the judgment is one that's not
12 constitutionally excessive. And I guess I come back to the
13 same question.

14 Why shouldn't I strive to find the highest number
15 that would satisfy due process and not be excessive in light
16 of the evidence that the jury heard, in the light most
17 favorable to Ms. Miller, would support a finding of, really,
18 conduct that deserves punishing primarily because of the
19 ongoing nature of her complaints and the ongoing lack of
20 response from Equifax?

21 MS. SUMNER: But, your Honor, the reprehensibility
22 analysis, when it comes to repeated conduct, does not focus on
23 the conduct with respect to Ms. Miller.

24 THE COURT: No, but I'm -- you're moving on to ratios.
25 And all of my questions to you just now have been in the

1 context of evaluating whether the ratio is excessive or not.

2 And when you -- you pick at a data point and say it
3 wasn't repetitious conduct or it was an algorithmic formula
4 supported by the FTC, well, the FTC representatives weren't
5 the person at the receiving end of two years of being
6 ignored. And so, to me, in the context of comparing a ratio,
7 one has to look at what the actual evidence was.

8 And here, the evidence in the light most favorable
9 to Ms. Miller was she could have -- she could have gone to
10 the corporate headquarters and put a plane overhead with a
11 banner, and it would have been ignored. I'm simply saying
12 it's a factor that I think one has to look at the evidence in
13 evaluating whether a ratio is too high. And we get -- the
14 Supreme Court says single digits are typically the range. So
15 that says to me, why isn't nine-to-one then appropriate?

16 MS. SUMNER: And I guess, your Honor, what I'm focused
17 on is if you're looking at appropriate ratios, then you also
18 should be looking at the reprehensibility factors --

19 THE COURT: Of course.

20 MS. SUMNER: -- in order to come to what would be
21 appropriate. And my point is that there is very little
22 evidence of reprehensibility. That's our position why we
23 believe that the ratio should be lowered, under these
24 circumstances.

25 And the concern that we have is once you move

1 outside of the context of what the Supreme Court said you
2 should focus on with respect to reprehensibility, then it is
3 very difficult and you start looking at many factors which
4 should not necessarily weigh into the analysis.

5 THE COURT: Well, you know, I'm perfectly capable of
6 acknowledging that Ms. Miller was not physically injured. I do
7 disagree with you that she did not suffer a meaningful harm.
8 She -- she did. And for two years, she dealt with this -- this
9 stonewall kind of response from Equifax. And she did worry and
10 she -- I'm saying in the light most favorable to the plaintiff,
11 about what was going to happen. Because this problem
12 continued, persisted, and was not being resolved.

13 I don't think that means defendant's conduct was not
14 reprehensible. I think it's a different caliber of
15 reprehensibility.

16 It's not a tobacco company pushing its wares on
17 unsuspecting consumers before public health and other
18 knowledge was at a point in time that they should have known
19 better.

20 It's not physically going to harm Ms. Miller. She's
21 not going to die of lung cancer because of that kind of
22 reprehensible conduct.

23 But we're talking about a consumer
24 reporting agency that exists by operation of law. It's
25 permitted to collect and rate and control the information of

1 all consumers who have very little control, it turns out,
2 over getting it right, even though that was a big part of
3 Congress's motivation and the legislative history around the
4 mechanisms to correct information.

5 And so when a jury hears that an agency does not
6 respond and the problem continues, that's a form of
7 reprehensibility; different in kind, but still worthy of
8 punishment, it seems to me, if the jury made that first call.
9 And it did here.

10 So what else did you want to add, before I take up
11 all of the time that plaintiff's counsel might want to use
12 today?

13 MS. SUMNER: Your Honor, I will -- I just wanted to
14 briefly address the third **Gore** guideposts, which was the focus
15 on -- on civil penalties.

16 THE COURT: Right.

17 MS. SUMNER: And there, I think I can be brief because
18 it is clear that the FTC has authority to impose 10,000 dollar
19 fines per FCRA violation.

20 And here I know that plaintiff's counsel referenced
21 that there was the ability to -- to find more for a
22 continuing violation. And there is not evidence in the
23 record to support that there was an ongoing continuing
24 violation of the FCRA. Here, this case, there was evidence
25 put on about several different potential violations of the

1 FCRA.

2 We don't know how many of those violations the jury
3 found. We know that they found at least one. But even if
4 they were to have found 18, they would have to do that in
5 order to get the -- the amount up to even the compensatory
6 damages, which the evidence would never support that number
7 of FCRA violations.

8 So, your Honor, in closing for -- for Equifax's
9 position, you know, we think that if you look at the
10 reprehensibility factors, there is -- in our perspective --
11 at most one that should be considered in the calculations.

12 If you look at the ratio of the compensatory to
13 punitive damages, it's so incredibly excessive and
14 inappropriate, and particularly in light of the fact that the
15 jury did not even find that harm to the plaintiff was as high
16 as argued by plaintiff's counsel.

17 And then finally, if you look to the parameters of
18 civil penalties, they pale in comparison to this jury's
19 verdict. So we ask that your Honor take all of those into
20 consideration and grant the Motion to Reduce the Punitive
21 Award. And from Equifax's perspective the appropriate award
22 would be a one-to-one ratio.

23 Your Honor, may I answer any further questions?

24 THE COURT: Not at the moment, but we'll see what
25 comes up.

1 Thank you very much, Ms. Sumner.

2 Counsel.

3 MS. LEONARD: Thank you, your Honor.

4 I appreciate your -- some of your comments, and I
5 would like to come back to those.

6 I would like to make a point about why this case is
7 different here. We have aggravated factors. The two I would
8 highlight right away is the repeated misconduct, which is an
9 enhanced represent -- reprehensibility factor; and what we
10 describe as an unwillingness to change behavior, which is
11 part -- which is a deterrence consideration and part of the
12 purpose of punitive damages as a whole.

13 And I won't go through the facts because you know
14 them better than I. You saw the testimony come in.

15 I do want to respond, though, on the -- the jury did
16 hear evidence, for example, of three other Fair Credit
17 Reporting Act cases. That was the **Kirkpatrick** case, the
18 **Valentine** case, and the **Drew** case, and the testimony of
19 Mr. Hendricks at transcript 306, 307. And I want to respond
20 to our post-trial submissions, including other cases.

21 These are, for the most part, coming out of the
22 court records. They're judgments in other cases. Two
23 against Equifax. **Angela Williams against Equifax**, out of
24 Florida in 2008. And the **Jantzen** decision, here in Oregon,
25 in 2010. Didn't involve punitive damages but did have a

1 compensatory award of 275,000 and a stipulated judgment.

2 Your Honor was involved in the -- that case and also the
3 attorney's fees litigation.

4 We also cited the **Judy Thomas against TransUnion**
5 case, which involved 300,000 in compensatory damages and
6 originally 5.3 million in punitives, which was reduced by the
7 trial court to 1 million. That's an Oregon district court
8 decision from 2002.

9 The nature of those claims appear in a reported
10 decision at 197 Fed.Supp 2d 1233, out of the District of
11 Oregon, 2002. And it makes clear that that's -- those claims
12 were about -- just like Ms. Miller's situation -- the failure
13 to reinvestigate and address errors in a credit file.

14 We've also submitted the -- and so all of these are
15 appropriate for you to consider, both in their form as
16 judgments, public records, and because of your particular job
17 as deciding a question of law here. It's kind of a mixed
18 bag, fact and law. But your job, now, is to consider due
19 process constitutional limits.

20 We've also submitted the -- and so you should not be
21 limited to simply the evidence before the jury.

22 We have submitted, also, the affidavit of the
23 Florida counsel in the **Angela Williams** case to explain what
24 the claim was about there; the same claims as in -- in issue
25 here: Mixed files and a failure to reinvestigate that went

1 on way too long.

2 I want to say why it is appropriate for you to
3 consider this evidence, in addition to the idea that you're
4 dealing with a question of constitutional law here, as the
5 jury was not.

6 First, the Federal Rule 50, which is about -- which
7 was about setting aside verdicts, entering judgments
8 notwithstanding verdicts, does deal with sufficiency of the
9 evidence in a sort of traditional sense. Directed verdict
10 motions, that sort of thing. But it turns out it's the
11 source of power for this Court to deal with reduction motions
12 under the Constitution. But that doesn't control the
13 evidence or limit the evidence that you can -- you can
14 consider because your decision is a legal one, not simply an
15 evidentiary one.

16 In **Cooper against Leatherman Tool Group**, the --
17 which was a Ninth Circuit case, went to the U.S. Supreme
18 Court, the Supreme Court tells us that the jury's punitive
19 damage award is not a fact. You know, in trial court we
20 regard it as a finding of fact. Here, it's not a fact. And
21 so when the court reduces or reconsiders a punitive damage
22 award, it's not re-examining a fact, which has Seventh
23 Amendment implications.

24 And in **Leatherman**, the court endorsed **Gore's** -- the
25 **Gore** factors and how it should be used. And, in particular,

1 used the phrase from the third **Gore** guidepost about
2 considering civil penalties authorized or imposed in
3 comparable cases.

4 So we've offered you evidence of verdicts imposed in
5 comparable cases, and that seems to be entirely consistent
6 with the constitutional job you're here to do.

7 Other things that the U.S. Supreme Court tells us
8 that the Court should consider include things like, as I
9 mentioned, comparable sanctions; what has happened elsewhere
10 in comparable litigation.

11 Third, we do a due process notice inquiry. And so
12 there, that considers other sources for the defendant's
13 notice of potential sanctions.

14 In **Gore**, the Court had a discussion about prior bad
15 acts that are relevant to sentencing. Sentencing is a
16 court's job, not the jury's job, in the usual criminal case.

17 And in -- just to give a comparable view, Oregon has
18 a statute which allows new evidence to come in that has not
19 been heard by the jury. It comes in -- if it comes in at
20 all -- for the first time on post-trial motion to reduce.
21 And that new evidence may include remedial measures the
22 defendant may have undertaken and other punitive damage
23 verdicts against the defendant. The statute is ORS
24 31.730(3).

25 And perhaps the best example I can offer you of why

1 it's appropriate for you to be able to consider everything
2 before you now is -- comes out of the **Gore** decision itself.
3 At page 565 and 566, there we see a discussion of evidence
4 that came in only on the post-trial briefing in the trial
5 court in that case. And that evidence was significant all
6 the way up, and significant to the U.S. Supreme Court when it
7 made its constitutional decisions. And that evidence
8 included things like verdicts in other cases, which **BMW**
9 **against Gore** had submitted in its post-trial briefing. It
10 considered the evidence that BMW had changed its policy after
11 this -- after the verdict came in. Changed its nationwide
12 policy. That was not before the jury.

13 And it considered testimony -- it sounds like it was
14 live testimony, perhaps, before the Court about other
15 lawsuits that had been filed against BMW; filed and settled.
16 And BMW was trying to make the point about whether they
17 involved repainting or not, so all of that new evidence was
18 before the Court for its consideration on its constitutional
19 function. So I think all of that is properly here.

20 So I would like to address the **Gore** -- **Gore**
21 guideposts. We believe there are several enhancement
22 reprehensibility factors in play here. Trickery and deceit
23 is in play. Yes, malice was taken off the boards because
24 there isn't evidence, everyone agreed, of malicious conduct.
25 And yet there is evidence of trickery and deceit in the form

1 of the letters that Equifax sent to Ms. Miller, which told
2 her they had conducted a reinvestigation, they had gone and
3 contacted sources of information, they had addressed her
4 concerns. All of this was false. They never did that. That
5 was the testimony that came out at trial.

6 There -- I would like to speak, now, about the --
7 her personal injuries. These are psychic harms. They're not
8 economic damages. They're personal injury damages. We call
9 them noneconomics. And here's why I think that they're
10 significant as an enhancement factor for reprehensibility.
11 And the courts -- many courts speak about this.

12 These are damages that are -- in many cases, they're
13 very small. Here they're not particularly small. But in all
14 cases they're hard to articulate and prove for the plaintiff
15 and they're hard for the jury to quantify. That means that
16 it's more difficult for plaintiff to have the incentive and
17 the ability to sue and bring -- and -- and right the wrong
18 that's been done to them. It's difficult for a lawyer to
19 take that case. It's difficult for a plaintiff to find a
20 lawyer to take the case. Those kinds of damages make these
21 cases harder to -- to prosecute. And, as a result, they
22 increase -- that all increases the chances of a defendant
23 getting away with it.

24 That's why this kind of damage is an enhancement
25 factor for reprehensibility. We see such a discussion, for

1 example, in the bed bug case, **Mathias**, out of the Seventh
2 Circuit. And many other cases talk about it.

3 You've talked a lot about financial vulnerability.
4 And of course we agree that, frankly, the reason Ms. Miller
5 is financially vulnerable here is because Equifax made her
6 so, and I think that's the crux of your remarks. And I agree
7 with them and I don't think I need to elaborate farther on
8 that.

9 We cited to you the **Saunders** case. Even in **Planned**
10 **Parenthood**, a doctor was considered vulnerable in this sense
11 because the doctor was threatened to -- threatened such that
12 he or she would not be willing to go to work and, thus, it
13 threatened their livelihood. So that was a vulnerability
14 factor that the **Planned Parenthood** case remarked upon.

15 Another factor in play here is the idea of the
16 evidence that showed harm to many others. And the **Williams**
17 **against Philip Morris** case uses the term, the plaintiff is
18 the "exemplar" for the extent of harm and the kind of harm
19 that the defendant may be willing to inflict on many others.

20 And here we have evidence of Equifax's admission at
21 trial that many others are exposed to the same mixed-file
22 problem. One to two percent was the testimony we heard from
23 the Equifax witness, which translates to 2 to 4 million
24 consumers. Now, I appreciate they're maybe not all Equifax
25 files, but that's a lot of consumers who are exposed here.

1 We have the evidence of the FTC's longstanding
2 concerns and the many complaints to which it was responding
3 in -- in the 1990s.

4 We have evidence about -- also from Mr. Hendricks,
5 about the time of Congressional hearings and their concerns
6 about widespread complaints for exactly this kind of problem,
7 the mixed-file response -- the mixed-file problem without
8 response.

9 Another reprehensibility factor here is the repeated
10 misconduct itself, and the evidence there being the -- the
11 past cases, in addition to consent decree in the past.

12 And here we have Mr. Hendrick's testimony. And I
13 want to go back to this and tell you the transcript pages are
14 306 and 307. These are in fact cases that are entirely
15 relevant because it is the same misconduct.

16 The question that plaintiff's counsel asked
17 Mr. Hendricks had to do with other cases in which consumers
18 disputed inaccurate information and it was not corrected.
19 That's the crux of all of these cases. And we have the three
20 cases, as you know, which Mr. Hendricks talked about.

21 So we think there are several enhancement factors
22 here that make Equifax's conduct particularly reprehensible.

23 With regard to the ratio, you asked the interesting
24 question about what deference, if any, should you give to the
25 jury's -- the jury's verdict.

1 And I would -- I went back to the jury instructions.
2 No, they were not, of course, instructed on a ratio, as you
3 recounted. But they were instruction -- they were instructed
4 on a reasonable relationship. And I think this is
5 significant.

6 It -- first it says -- and I'm looking at -- this is
7 page 21, but it's not going to be accurate -- I can find the
8 transcript cite a little later, your Honor.

9 THE COURT: I have the instructions. Go ahead.

10 MS. LEONARD: Okay. Can't give you the page cite.

11 But, You may consider the relationship of any award
12 of punitive damages to any actual harm inflicted on
13 plaintiff -- inflicted on plaintiff and defendant's net
14 worth.

15 And then the caution: You may not set the amount to
16 punish for -- defendant for harm to others other than
17 plaintiff in the case.

18 So they had -- they had a directive to consider the
19 relationship, and I think they did do that. And for that
20 reason I think their -- their view of the relationship is
21 entitled to deference here.

22 Because this is a -- both a fact and a law inquiry
23 and because your job is not to be a 13th juror here but,
24 rather, simply to set the highest number that the
25 Constitution would permit, it is entirely appropriate for you

1 to consider the jury's response here. The jury's response to
2 the evidence, as reflected in the verdict.

3 I would like to talk about two features of -- that
4 are relevant to the ratio. Two things to consider with
5 regard to the plaintiff's harm. The first has to do with the
6 idea of potential harm, which has been endorsed in **TXO** and
7 other cases. The idea that actual -- the actual number on
8 the verdict -- the actual harm number on the verdict is not
9 the end of the inquiry.

10 It's appropriate to consider plaintiff's potential
11 harm that would have been incurred -- she would have incurred
12 if the misconduct hadn't stopped.

13 And in this respect, the jury -- we have two years
14 of frustration, anxiety, reputational damage, bad credit.
15 And the jury awarded 180,000 dollars. That looks like 90,000
16 dollars a year. If we extend that out over a reasonable
17 lifetime for a conflict, it can add up very quickly.

18 We've given you other cases. The **Williams** case was
19 a dispute process that went on for 13 years. The **Jantzen**
20 case was a dispute process that went on for 18 years.

21 The **Thomas** case, which was not against Equifax -- it
22 was against TransUnion -- went on for six years. So we know
23 that the jury has given us a number of actual harm, but we
24 know that we can also consider potential harm for all -- for
25 the -- for the plaintiff if her injuries had not been

1 terminated by this litigation and correcting her file.

2 The other aspect of plaintiff's damages that I
3 wanted to talk about -- and you already signaled your
4 thinking about that -- was the attorney's fees as part of
5 compensation.

6 We've cited some cases which have done exactly that,
7 considered the attorney's fees as part of the compensation.
8 And these cases, for the most part, are cases with statutory
9 attorney's fees built in. So a civil rights statute, for
10 example, was involved in one case. Insurance protection
11 statutes feature in several of the cases we found. There was
12 even a consideration given in a maritime claim out of
13 Washington state.

14 And I -- I think it's entirely appropriate to do
15 that in this case by virtue of the statute itself. The
16 Federal Credit Reporting Act statute itself, 15 U.S.C.
17 1681(n) and (o), both describe the liabilities of a -- of the
18 violator and the amounts they should pay. And they list
19 those things that should be paid as a package. In other
20 words, attorney fees are not set off in some other part of
21 the statute, as some -- some courts have found that. Right?

22 And here we see in the Federal Credit Reporting Act
23 a person who willfully or even negligently -- same thing --
24 violates the law, is liable to the consumer in an amount
25 equal to the sum of, one, actual damages or statutory

1 damages; two, punitive damages, if it's a willful violation;
2 and attorneys fees. All of this as a package, which looks to
3 me like compensation for the plaintiff.

4 THE COURT: The Supreme Court's never taken attorney
5 fees into account in looking at a ratio.

6 MS. LEONARD: **BMW against Gore.** In that case -- and I
7 would refer you to Justice Breyer's concurring opinion.

8 THE COURT: Oh, dear. Concurring opinion.

9 MS. LEONARD: All right. Well, hang in with me just
10 for a minute, at pages 591, 592.

11 Justice Breyer liked the idea of including
12 litigation costs and attorney's fees as a part of
13 compensation, as part of the ratio analysis. Explicitly said
14 that.

15 Because, in Alabama, the costs of litigation is one
16 of their seven or eight factors they use for their own
17 remittitur review. And that's indeed what the court did --
18 the trial court, and the state reviewing courts in Alabama --
19 in the **Gore** case. Okay? So that was already in the case,
20 when it came up to the Supreme Court.

21 And here's what Justice Breyer said about that. He
22 says, This standard, the idea that you include litigation and
23 attorney fees in there, this standard provides meaningful
24 constraint to the extent that the enhancement is -- it
25 authorizes is linked to a fixed ascertainable amount

1 approximating actual costs, even when defined generously to
2 reflect the contingent nature of plaintiff's victories.

3 And so he's endorsing this coupling --

4 THE COURT: So you've got one. How about others on
5 the Supreme Court?

6 MS. LEONARD: The others didn't discuss this --

7 THE COURT: Right. That's the problem with the
8 concurring opinion.

9 MS. LEONARD: They didn't discuss it. But --

10 THE COURT: But if you start here, I grant you that --

11 MS. LEONARD: He likes it precisely because it's
12 quantifiable and potentially, in his view I think, limiting.
13 It gives a number --

14 THE COURT: He didn't say one-to-one. You know, you
15 can put formulas out there. But until you know what all of the
16 variables are, I'm not sure this really provides much help.

17 So the concern I have about attorney fees, in the
18 context of ratios, is that they really have nothing to do
19 with compensating -- quantifying the degree of harm to the
20 plaintiff.

21 The attorney fee --

22 MS. LEONARD: Well, I have to disagree -- I'm sorry.

23 THE COURT: Well, the attorney fee measure is, in --
24 in -- is a remedy provided by the Congress, in this context, to
25 ensure that even in that one dollar case the plaintiff doesn't

1 lack the incentive to go forward.

2 Even in those cases of minimal damage, there will be
3 compensation to the attorney, so that the case doesn't die on
4 the shelf.

5 I don't think it has a bearing on ratio because
6 ratio goes to the quality of the defendant's conduct, as
7 compared to the harm the plaintiff sustained. One is
8 comparing those throughout the **Gore** guideposts.

9 A lawyer may be particularly efficient and have a
10 very low attorney fee charge in a case that's particularly
11 egregious. On the other hand, a lawyer might be not very
12 efficient. It might be a case where there are two lawyers
13 doing the work of one. It could be a variety of factors.

14 Lawyers and attorney fees and load stars, and all of
15 the factors that go into determining what is a reasonable
16 fee, that body of law really does not connect in my view to
17 this.

18 And until we've got some -- somebody who places
19 parameters around the ratio and -- and thereby determines
20 whether this is or isn't something the Court in a reduction
21 motion should consider, I -- I think it simply serves as a
22 putatively objective basis on which to ratchet up the ratio.

23 I say "putatively," because I don't think it has
24 anything to do with the degree of harm.

25 The harm to the plaintiff is really what the ratio

1 is about, also the fact of the civil penalties and other
2 fines or punishments.

3 I think factoring an attorney fee award in is
4 exactly the wrong thing to do because it is so much dependent
5 upon the -- the case management skills of the lawyer, the
6 degree to which you're dealing with a -- a court that does or
7 doesn't move the case forward.

8 It really has nothing to do with the underlying
9 harm. And -- and -- and the plaintiff's already getting the
10 benefit of the attorneys being paid. So I'm just not there,
11 unless you've got a case that says I have to do this.

12 MS. LEONARD: No. I don't have a case that says --

13 THE COURT: Then we really shouldn't waste time on it.
14 You've made your point, and you can argue it to the Ninth
15 Circuit that I should have considered it. I just don't think
16 it's helpful here.

17 MS. LEONARD: One other Supreme Court case that might
18 be of interest is the **TXO** case. And there -- that was the
19 oil-and-gas deed. You remember it. And the only damages that
20 the small company, who was being abused by the large company,
21 had were litigation costs. It was 19,000 dollars in litigation
22 costs, and those were entirely appropriate damages.

23 THE COURT: But those weren't attorney fees awarded by
24 statute.

25 MS. LEONARD: No, they were not. They were not.

1 THE COURT: It's a different calculus.

2 MS. LEONARD: I would like to briefly touch on the
3 comparable civil fines.

4 I believe the FTC has significant enforcement
5 authority, and I think the defendant's point is that -- well,
6 there needs to be violation consent decrees or there needs to
7 be ongoing offenses for the FTC to move in and do something.

8 But in fact if they were to move in and do
9 something, they can disgorge profits, they can enforce
10 injunctions. These are very powerful remedies that can be
11 quite crippling to a business. So I don't think we just need
12 to consider the 10,000 dollar fine when we're looking
13 somewhere for a comparable notice component and an
14 appropriate punishment component. It's out there already
15 with the FTC statutes.

16 And -- and just one thought about how Equifax has
17 been using FTC's inaction here to justify its behavior.

18 The FTC has not forced them to change. I think
19 Equifax describes that as an endorsement of their practices,
20 and I don't think it is. And I think it's significant that
21 the FTC has been inactive here.

22 It highlights the need for private attorneys
23 generally. Like Ms. Miller, as difficult as it is for her to
24 bring this case, she needs to be here. She's the first and
25 maybe last defense for the enforcement of the law because I

1 think the jury was aware that the FTC had its concerns but
2 hadn't done anything, in this respect, for some years.

3 The final discussion I want to have has to do with
4 deterrence in particular.

5 Two thoughts. Wealth matters. And I looked at the
6 **Southern Union Company** case, **against Irvin**, that the
7 defendants, I think, cited. I don't think we cited it. That
8 was a punitive damage case that went up and down a couple of
9 times to the Ninth Circuit, ultimately resulting in a
10 three-to-one verdict. That was the Arizona commissioner who
11 steered a merger decision in the wrong direction for
12 self-dealing, self-gain.

13 The jury awarded 390,000 in compensatory damages, 60
14 million in punitive damages, which was reduced on appeal. I
15 think the court used a three-to-one ratio.

16 But the interesting part of that case was Judge
17 Reinhardt's concurring opinion to raise the issue, once
18 again, that wealth matters. What is ruin to one may be a
19 matter of indifference to another was his point. And that's
20 in play here.

21 The second point I want to make about deterrence is
22 the evidence we have of Equifax's willingness to persist with
23 law violations, even in the face of significant jury awards.

24 I would contrast this evidence with what was going
25 on in the **Gore** case before the U.S. Supreme Court. The court

1 noted, in particular, the absence of any evidence that BMW
2 had persisted in a course of conduct after it had been judged
3 unlawful, at page 579. And later on at 584 or 585, there was
4 no history of noncompliance with nonstatutory requirements.

5 And so the putative damage award could be more
6 modest because it wasn't necessary to motivate full
7 compliance with the law.

8 This highlights, for me, that the need to secure law
9 compliance is a very legitimate concern, and I think it's
10 very much in play here.

11 We've described to you the -- the -- the jury
12 verdicts that have already come in over the last few years,
13 and these significant amounts have not deterred Equifax, have
14 not changed behavior.

15 In particular, the **Angela Williams** case, out of
16 Florida, a total of 3 million dollars. A combination of
17 significant punitive damages and significant compensatory
18 damages. That was entered just a short time before
19 Ms. Miller started her own dispute process here in 2008.

20 So we can't let -- we can't ignore the jury when it
21 says this shouldn't be a matter of indifference to Equifax.
22 They saw a defendant who was willing to defend and maintain a
23 practice that violated the law. There was no acknowledgment
24 of wrongdoing. The business is built with financial
25 incentives to continue law violations, not the reverse. It

1 doesn't -- Equifax doesn't make money fixing these files.

2 And the people who receive the information, the
3 banks, yes, they probably care about accurate information.

4 But if it's inaccurate and -- and disparity -- disparaging to
5 the consumer, they simply charge higher interest rates.

6 That's all to the good for the bank.

7 It's difficult for consumers to bring claims and
8 litigate. That's a deterrence consideration. And we can't
9 allow a system that sustains a defendant's ability to pay
10 verdicts without changing behavior. That's the **Johansen**
11 case, the pollute-and-pay case. I don't think due process
12 requires you to condone a violate-and-pay policy here. In
13 fact, in the **Brim** case, the court said that a reduction that
14 does not adequately punish and deter is itself arbitrary.

15 THE COURT: What's the highest ratio that you think
16 can be sustained?

17 MS. LEONARD: It depends on how you view the damages.

18 THE COURT: Well, let's factor out the attorney fees,
19 point one.

20 MS. LEONARD: Let's look at -- let's look at -- you
21 asked about cases -- ratios in cases that we know of.

22 We have the **Williams** case, a 12.3-to-1. That's the
23 **Angela Williams** case out of Florida. And that was sustained
24 by the trial court.

25 THE COURT: And what became of that verdict?

1 MS. LEONARD: I believe the case settled.

2 THE COURT: Okay.

3 MS. LEONARD: It did not go up on appeal.

4 And we have the **Dixon-Rollins** case, nine-to-one.

5 I think the reprehensibility factors, though, and
6 the -- warrant a higher -- more than a single-digit ratio.

7 And I also think the damages are bigger than 180,000 for you
8 to consider when -- when you make a ratio determination.

9 THE COURT: Why do you say that?

10 MS. LEONARD: Because of the potential harm factor
11 here. The idea that this law violation could have gone on for
12 a long time.

13 THE COURT: But it didn't.

14 MS. LEONARD: It didn't. But it could have. And
15 that's part of, I think, what -- in **TXO**, that was a
16 consideration for the Court. What about the potential loss of
17 royalties if **TXO**'s scheme had succeeded?

18 You know, in the **TXO** case, the little guy had
19 already gotten protection with a declare -- defending a
20 declaratory judgment order before going into court to sue for
21 slander of title, in West Virginia.

22 So there was no damages beyond their -- their
23 litigation defense damages. Right?

24 But the court was willing to consider the potential
25 harm to this defendant if the scheme had succeeded. And that

1 was a stream of royalties over many years. It was worth a
2 lot of money.

3 And that was one way the Court analyzed the
4 relationship between the harm and the punitive damage award,
5 which was quite large. That's at page 462 of the **TXO**
6 decision.

7 THE COURT: Is there anything else you wanted to add?

8 MS. LEONARD: Thank you, your Honor.

9 THE COURT: Thank you.

10 Ms. Sumner, anything else?

11 MS. SUMNER: Yes, your Honor, if I may.

12 THE COURT: Sure. You're here. I'm all ears.

13 MS. SUMNER: Thank you.

14 I do -- I would like to respond to several comments.
15 One is the repeated conduct issue.

16 I think plaintiff's counsel is conflating the
17 concept of what should be considered for purposes of repeated
18 conduct as one of the reprehensibility factors and what
19 should be considered when looking at appropriate ratios. The
20 idea of -- of bringing in additional evidence outside the
21 record in order to determine whether there was
22 reprehensibility and repeated conduct is entirely
23 inappropriate.

24 And if -- if what they would like to do is to hold
25 an evidentiary hearing and open it up for evidence outside

1 the record, we're going way beyond a motion that is a matter
2 of law and way beyond the Supreme Court's analysis of -- in
3 terms of reducing the punitive damages award.

4 THE COURT: Well, I -- I think I agree with what
5 you're saying, which is that to the extent I'm to consider at
6 all the decisions made in other proceedings for purposes of
7 evaluating the question of ratios, that's appropriate.

8 If that evidence has been submitted and defendant
9 wants an opportunity to respond to it with additional
10 evidence, that -- that can be done.

11 If the point is that it's not appropriate for the
12 Court to consider extra-record evidence in evaluating
13 reprehensibility, I think I agree with that. We deal with
14 what the evidence was at trial.

15 But when I'm asked to compare, you compare to what's
16 relevant. And that could be what the FTC has done. That
17 could be what other courts have done. That's why I'm still
18 asking, What are you finding in the case law? So --

19 MS. SUMNER: And I -- I think I mostly agree with what
20 you're saying, your Honor, until we start moving away from case
21 law.

22 When we get into declarations that don't provide an
23 opportunity to distinguish matters -- like, for example, the
24 **Williams** case -- I do agree --

25 THE COURT: You're not hearing me. To the extent you

1 want to supplement the record on behalf of your client with
2 respect to so-called extra-record evidence the plaintiff has
3 provided, knowing that I'm going to consider it in the context
4 of ratios and the third **Gore** guidepost, you may do that.

5 MS. SUMNER: And -- okay. And, your Honor, we may
6 like to do that, given --

7 THE COURT: Well, you're going to make a decision, if
8 you want to do that, today because this case has been pending
9 quite a while and I'm getting close to resolving it. So if you
10 want a brief opportunity to add your comment to their
11 commentary about ratios and the third guidepost, you can do
12 that.

13 MS. SUMNER: Then, your Honor, we would like that
14 opportunity. Thank you.

15 THE COURT: Fair enough.

16 MS. SUMNER: The -- several other comments I would
17 like to respond to, and that is the continued accusation that
18 Equifax is unwilling to change its behavior. That is entirely
19 inconsistent with the record that -- of evidence that was put
20 in at trial.

21 Your Honor heard testimony from Equifax's
22 representatives, as well as the expert, about the many
23 changes that Equifax has implemented over a long period of
24 time and specifically with respect to the issues that ebb --
25 that were in evidence in this case.

1 Equifax did not ignore the problem with respect to
2 Ms. Miller, once it recognized the confusion at the agent
3 level.

4 And, in fact, Ms. Mixon testified here in this
5 courtroom about steps that she took to try to address that
6 confusion because of this particular circumstance. So it's
7 unfair for them to stand here today and argue that Equifax is
8 unwilling to change. That is not consistent with the record.

9 THE COURT: All right. Is there anything else you
10 wanted to add?

11 MS. SUMNER: Yes, your Honor.

12 THE COURT: Go ahead.

13 MS. SUMNER: I think the -- the citation to Oregon
14 state law concerning adding new evidence is not relevant for
15 this proceeding.

16 THE COURT: I agree.

17 MS. SUMNER: And then I -- your Honor, with respect to
18 this issue of trickery and deceit, I -- I think that counsel is
19 talking out of both sides of -- of her mouth here because we
20 had lengthy discussion during the trial about the punitive
21 damages jury instruction. And it was in fact Equifax's desire
22 to have an instruction that showed that punitives involved a
23 much higher degree of -- of -- of malice and deceit and
24 intentional conduct, although it could also be recklessness.

25 And, for now, for them to argue that there was that

1 type of intent in order to support the reprehensibility
2 guideposts, I think, is entirely inconsistent with what was
3 represented at trial.

4 Your Honor, I -- with respect to injury, I would --
5 I would ask you to take a look at the **Bach** decisions because
6 there the court made clear that FC -- FCRA violations had the
7 potential for economic injury only, which would include
8 emotional distress in the economic realm, not physical harm.
9 So to try to push the emotional distress into a somehow
10 physical injury is inconsistent with the case law.

11 Responding briefly to the comments about Evan
12 Hendricks' testimony in suggesting that because he made a
13 very broad conclusory comment that other consumers disputed
14 inaccurate information that was not corrected, that covers an
15 enormous number of potential policies and procedures and a
16 wide variety of factual circumstances that could be entirely
17 different from what was at issue in this trial. And so,
18 again, I do not think that would support the **Gore** guideposts.

19 As to the comment that the jury's verdict should be
20 entitled to deference, I think it is clear from the **State**
21 **Farm** decision that an unconstitutional verdict is not
22 entitled to deference. And that you don't start by look
23 being at the excessive award. You start by looking at the
24 guideposts.

25 With respect to potential harm, your Honor, counsel

1 particularly asked you to take a look at the **TXO** case and --
2 to support that you should consider potential harm, and which
3 would mean going beyond the actual harm that the -- the
4 compensatory damages that the jury awarded.

5 That case focused on potential harm where there
6 was -- where there was not any real actual harm.

7 So the point there was that the Court found that,
8 for example, if the wrongful plan doesn't actually succeed,
9 then it may be appropriate to look at potential harm.

10 That is not the case here. There -- there was
11 actual harm. The plaintiffs spent an enormous amount of time
12 putting evidence up to prove that harm, and the jury awarded
13 compensatory damages. So that -- that case does not apply to
14 the context here.

15 With respect to attorney's fees, just two comments:
16 One, the **Gore** case, 1996, was before **State Farm**, 2003. If
17 the Supreme Court had intended to consider attorney fees at
18 that point, it certainly had the opportunity to do that.

19 It didn't when the case was remanded to Utah. Utah
20 Supreme Court specifically found that the attorney fee
21 measure should not be considered in that **State Farm** would not
22 support that.

23 With respect to the comments about the FTC, this is
24 not about the fact that the FTC simply didn't act. There was
25 testimony during trial about the fact that the FTC has

1 reported and -- information to support the type of matching
2 process that the CRAs -- CRAs use.

3 In terms of deterrence and this whole concept of
4 wealth matters, juries should not punish defendants for who
5 they are, as opposed to what they did. And **State Farm** --

6 THE COURT: Yet we are, as a matter of law, required
7 to instruct the jury to take into account the wealth of the
8 defendant in determining how much is necessary for punishment.

9 MS. SUMNER: I recognize that. But the Supreme Court
10 also found in **State Farm** that massive wealth cannot justify an
11 otherwise unconstitutional punitive award, and I feel like that
12 is what plaintiff's --

13 THE COURT: And it's the "and otherwise
14 unconstitutional" part of the phrase that I guess bears
15 focusing on.

16 Wealth does matter, but it matters in a way that has
17 to balance in the context of the nature of the harm, the
18 nature of the defendant's conduct. And we come back, I
19 think, in the end to the undisputed rule that
20 reprehensibility is the most important factor in the -- in
21 the balance.

22 MS. SUMNER: Finally, your Honor, I would just like to
23 also point out -- and this, again, is in the record -- Equifax
24 doesn't profit from inaccuracies. Equifax's business model
25 depends on providing accurate information.

1 So there is no reason for Equifax to -- to ignore
2 inaccuracies. In fact, the procedure is to try to address
3 all inaccuracies to the extent possible.

4 Finally, your Honor, I -- I believe that if -- if
5 your Honor were to take the suggestion of plaintiff's counsel
6 and look at a 9-to-1 or a 12-to-1 ratio, we believe under the
7 guidepost analysis that that would be unconstitutional.

8 THE COURT: You mean in summary, or with respect to
9 any particular factor being weighed too heavily?

10 MS. SUMNER: Your Honor, in going through the
11 analysis, both with respect to, one, reprehensibility, I think
12 is in line with the majority of the cases, which are within the
13 low single-digit ratios, not consistent with the higher ratios;
14 like, for example, the -- the nine-to-one in **Planned**
15 **Parenthood**, or some of the other cases that -- or the polluted
16 pay cases. So my -- my point being that if -- our view of
17 going through the constitutional analysis would put the
18 constitutional limit much lower.

19 THE COURT: All right.

20 MS. SUMNER: Thank you, your Honor.

21 THE COURT: Thank you, Ms. Sumner.

22 Anything else?

23 MS. LEONARD: Nothing, unless you have questions.

24 THE COURT: I always have questions. I just don't
25 think either -- either of you, as capable as you are, can

1 answer them. So it's left to me to sort through this, and I
2 will do that.

3 Now, if you -- if Equifax wants to submit a
4 supplement in -- in further support of its Motion for
5 Reduction, that addresses only the additional factual
6 material that plaintiff provided, knowing that it is for the
7 purpose of the Court considering it in the second and third
8 of the **Gore** guidepost factors, you may to do that. But you
9 need to do it rather soon because I want to get this motion
10 resolved.

11 I appreciate we're on the eve of the year-end
12 holidays. So how about January 3rd?

13 MS. SUMNER: May I beg you for slightly more time?

14 THE COURT: I was going to say -- well, look, Counsel,
15 this isn't rocket science.

16 January 3rd is generous. It was going to be Friday.

17 MS. SUMNER: All right. Well, given that, your Honor,
18 thank you.

19 THE COURT: You're welcome. And I don't think
20 plaintiff needs an opportunity to provide anything else since
21 plaintiff opened this door.

22 MS. LEONARD: Okay.

23 THE COURT: You've made your points. You have all of
24 the data at your fingertips. I have the benefit of the
25 argument.

1 So I'll take the motion formally under advisement on
2 January 3rd, or sooner if defendant's supplemental material
3 is received then.

4 Thank you, everybody.

5 Happy holidays.

6 MS. SUMNER: Thank you, your Honor.

7 MR. JUSTIN BAXTER: Thank you, Judge.

8 MS. SUMNER: Happy holidays to you, too, your Honor.

9 MS. LEONARD: Thank you, your Honor.

10 (Conclusion of proceedings.)

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14 I certify, by signing below, that the foregoing is a correct
15 transcript of the oral proceedings had in the above-entitled
16 matter this 26th day of December, 2013. A transcript without
17 an original signature or conformed signature is not certified.
18 I further certify that the transcript fees and format comply
19 with those prescribed by the Court and the Judicial Conference
20 of the United States.

21

/S/ Amanda M. LeGore

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AMANDA M. LeGORE, RDR, CRR, FCRR, CE

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